have enacted compulsory workmen's compensation acts have been rewarded by having their acts upheld.[12] Some states have amended their state constitutions to permit legislation of this sort.[13] The Arizona constitution goes so far as to direct the legislature to enact it.[14] It is not explained in just what manner these provisions remove the objections under the Fourteenth Amendment; [15] this is more evidence that those objections are really non-existent. So it seems probable that compulsory legislation would now be held good in most jurisdictions.

The present outlook shows, therefore, the great change that has occurred since the decision in the Ives case. The reason for this is found in the nature of the thing decided. As has been often said, decisions on the limits of due process and the propriety of what is claimed to be an exercise of the police power are decisions mainly of fact and public policy.[16] Results are different as facts change or are more clearly brought to the attention of the court.[17] Courts appreciate more fully the strength of settled public convictions. So legislation that once seemed an unreasonable interference with the liberty and property of citizens is seen, though the court may still be a disbeliever in its wisdom, to embody a sufficient public sentiment and to be calculated to effect a sufficient public purpose to make it not an unreasonable exercise of power.[18] These decisions have met with general favor, evincing as they do a decent respect for the opinion of the legislature, and leaving to that body the large room for experiment which the wisest critics of our institution have always held desirable.[19]

TENANCY BY THE ENTIRETY AND THE NEW YORK TRANSFER TAX. — The members of the New York Court of Appeals have just expressed three

process" clauses should be removed from our state constitutions, and the whole matter left to be governed by the Fifth and the Fourteenth Amendments.

[12] State *v.* Claussen, 65 Wash. 156, 117 Pac. 1101; Stoll *v.* Pacific Coast Steamship Co., 205 Fed. 169 (Washington act); State *v.* Creamer, 85 Oh. St. 349, 97 N. E. 602 (where the act was compulsory on the employee after his employer had elected); and the two principal cases. *Contra*, Cunningham *v.* Northwestern Improvement Co., 44 Mont. 180, 119 Pac. 554, on an unfortunate detail of the Montana law. The court considers the other provisions of the act and declares that they are not repugnant to the constitution.

[13] Ohio (CONST., Art. II, § 35, adopted Sept. 3, 1912); California (CONST., Art. XX, § 21); New York (CONST., Art. I, § 19, adopted Nov. 4, 1913); Wyoming (adopted 1913); Vermont (adopted April 8, 1913).

[14] ARIZ. CONST., Art. XVIII, § 8.

[15] Hence a judge of the New York Supreme Court, before the decision in the principal case, expressed the opinion that the new act was unconstitutional. Herkey *v.* Agar Mfg. Co., 90 N. Y. Misc. 457.

[16] See A. A. Bruce, in 20 GREEN BAG 546, 552; Prof. Frankfurter, in 28 HARV. L. REV. 790; FREUND, POLICE POWER, §§ 21, 63.

[17] Compare, for instance, the discussion in Lochner *v.* New York, 198 U. S. 45, 59, and in People *v.* Williams, 189 N. Y. 131, 81 N. E. 778, with that in the dissenting opinion of Harlan, White, and Day, JJ., in Lochner *v.* New York, 198 U. S. 45, 70, and with Muller *v.* Oregon, 208 U. S. 412, 419, and with McLean *v.* Arkansas, 211 U. S. 539, 549, and with People *v.* Schweinler Press, 214 N. Y. 395, 108 N. E. 639.

[18] See Holden *v.* Hardy, 169 U. S. 366, 386; Otis *v.* Parker, 187 U. S. 606; Noble State Bank *v.* Haskell, 219 U. S. 104; Borgnis *v.* Falk Co., 147 Wis. 327, 349, 372, 133 N. W. 209, 215, 223.

[19] See THAYER, LEGAL ESSAYS, 16 *et seq.*; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 253.

different opinions upon the following case: A man deeded property to himself and his wife expressly declaring that the grantees were tenants by the entirety. He later willed all his property to his wife and died in her lifetime. The question arose whether the transfer of any of the property could be taxed under the law which provides for taxing transfers to take effect in possession or enjoyment at or after the death of the grantor.[1] *Matter of Klatzl*, N. Y. L. J., Oct. 20, 1915. Perhaps the opinion of three majority judges is inaccurately reported. The provision of the deed characterizing the tenancy is set forth. It is also pointed out with great particularity that tenancy by the entirety has not been abolished in New York either by the married women's acts [2] or by the statute which provides that every estate granted to two persons in their own right shall be a tenancy in common unless expressly declared to be a joint tenancy.[3] The decision then is that half the property is subject to the tax, because the deed created a tenancy in common by not expressly declaring the estate to be a joint tenancy. It is a subject for speculation how any one *could* create a tenancy by the entirety under this holding.[4]

The main argument of the dissent is clear. Since tenancies by the entirety still exist, this deed must be given that effect in accordance with its expressed intention. The wife then at once became seized of the whole estate under the deed, and, nothing new having passed to her on the husband's death, no transfer tax should be imposed. There is one difficulty here, however. It is an ancient rule that a man cannot convey to himself.[5] The dissent meets this by saying that the grantor did not convey to himself, but to a separate entity composed of himself and his wife. They, however, indorse the statement that at common law "the wife had no legal existence apart from the husband, who in contracting with her simply contracted with himself." And it used to be said, on a parity of reasoning, that he could not convey to his wife.[6] In short, the old common-law

---

[1] TAX LAW, § 220, subsec. 4; 5 CONS. L., p. 5978.

[2] Bertles *v.* Nunan, 92 N. Y. 152; Zorntlein *v.* Bram, 100 N. Y. 12, 2 N. E. 388; Stelz *v.* Shreck, 128 N. Y. 263, 28 N. E. 510. *Cf. In re* Thompson's Estate, 81 Misc. 86, 142 N. Y. Supp. 1064. The most pertinent statutes are summarized in DOM. REL. L., §§ 51, 56; 1 CONS. L., pp. 1037, 1054. The weight of authority under similar statutes is in accord. Pray *v.* Stebbins, 141 Mass. 219, 4 N. E. 824; Diver *v.* Diver, 56 Pa. St. 106; Baker *v.* Stewart, 40 Kan. 442, 19 Pac. 904. See 2 REEVES, REAL PROPERTY, 975; 1 WASHBURN, REAL PROPERTY, 5 ed., 426. 2 BISHOP, MARRIED WOMEN, § 284. Voluminous authority is collected in 30 L. R. A. 314–317. But *cf.* Green *v.* Cannaday, 77 S. C. 193, 200.

[3] See New York cases in n. 2, *supra*. The statute is REAL PROP. L., § 66; 4 CONS. L., p. 4960. Similar statutes in other states are given the same construction. Boland *v.* McKowen, 189 Mass. 563, 76 N. E. 206; Shaw *v.* Hearsey, 5 Mass. 521; Hardenbergh *v.* Hardenbergh, 10 N. J. L. 42. See FREEMAN, COTENANCY, §§ 65, 66. *Contra*, Hoffman *v.* Stigers, 28 Ia. 302, 307. Even statutes abolishing survivorship in joint tenancies do not extend to tenancies by the entirety. Thornton *v.* Thornton, 3 Rand. (Va.) 179.

[4] These judges inform us that tenancy by the entirety must be considered "pretty much independent of any principles which govern other cases." They appear to have succeeded.

[5] See Southcot *v.* Stowel, 2 Mod. 207. Pibus *v.* Mitford, 1 Vent. 372, 378; LEAKE, LAND LAW, 2 ed., 36.

[6] See WILLIAMS, REAL PROPERTY, 22 ed., 317; SCHOULER, HUSBAND AND WIFE, 429; 1 WASHBURN, REAL PROPERTY, 279; LEAKE, LAND LAW, 37, n. (*b*).

joke that man and wife were one, and he was the one,[7] was close to the truth. Now the dissent maintains that neither the statute allowing direct conveyance between spouses nor any similar statutes have affected the unity of person. Must it not be, then, that the husband is still the one? If so, the conveyance failed altogether and the assessment should have been upon the whole property passing by will. But if metaphysical reasoning can help us at all, it would seem as a matter of logical necessity that a statute making possible a conveyance from husband to wife severs the unity for that purpose.[8] We have then a conveyance to two persons, one of them the grantor, to be seized *per tout*, and since he cannot take, the other grantee takes all.[9] In this view of the case no tax was assessable. Possibly the majority construed the conveyance as creating a tenancy in common [10] on the ground that this would be on the whole more in accord with the general intention of the grantor than the result here reached, but the opinion reported gives no basis for this explanation.

The Chief Justice, while being of the opinion that a tenancy by the entirety had been created, swung the decision in favor of the tax by a liberal construction of the Transfer Tax Law. It may well be contended that in a popular sense the wife did not acquire the use and enjoyment of half the property until the grantor's death. But the fact remains that in contemplation of law she at once acquired from the deed the right to use and enjoy the whole. True, her husband had that right also, but they were each seized *per tout et non per my*.[11] Queer and artificial as the

---

[7] See SCHOULER, HUSBAND AND WIFE, 9; 1 WILLIAMS, REAL PROPERTY, 22 ed., 311.

[8] See Saxon *v.* Saxon, 46 Misc. 202, 93 N. Y. Supp. 191. It has been said that any destruction of the unity must preclude the existence of tenancy by the entirety. See Stelz *v.* Schreck, 128 N. Y. 263, 267, 28 N. E. 510, 511. It seems a safer doctrine that the nature of the tenancy would persist until expressly changed even if the apparent reason therefor no longer exists. See Bertles *v.* Nunan, 92 N. Y. 152, 165. "This maxim (of the unity) is one of those fictions of the law intended to subserve a useful purpose but not to be applied absolutely and without qualification." Knapp *v.* Windsor, 60 Mass. 156, 157. The spouses never were regarded as identical with regard to property rights. Even Bracton uses a "*quasi*": [8] "*vir et uxor sunt quasi unica persona quia caro una, et sanguis unus.*" Quoted in CO. LIT. 187 (*f*). The dissent admits they may hold as tenants in common. This is clearly the case where they thus acquire the property before marriage, and by the weight of authority they may by express words *take* as tenants in common during coverture. Miner *v.* Brown, 133 N. Y. 308, 31 N. E. 24. See McDermott *v.* French, 15 N. J. Eq. 78; 1 WASHBURN, REAL PROPERTY, 425; 2 BISHOP, MARRIED WOMEN, § 285; 4 KENT, COMM. 363; 2 PREST., ABSTR. OF TITLE, 41. *Contra*, Stuckey *v.* Keefe's Executors, 26 Pa. St. 397; FREEMAN, COTENANCY, §§ 71, 72. In New York they can take as joint tenants. Jooss *v.* Fey, 129 N. Y. 17, 29 N. E. 136; Wurz *v.* Wurz, 15 N. Y. Supp. 720; Cloos *v.* Cloos, 8 N. Y. Supp. 660. The unity theory is, however, carried to the extent of holding that the spouses are together seized of one and not of two shares when they hold in common with others. Barber *v.* Harris, 15 Wend. (N. Y.) 615; *In re* Jupp, 39 Ch. D. 148; Darden *v.* Timberlake, 139 N. C. 181, 51 S. E. 895. See 1 WILLIAMS, REAL PROPERTY, 22 ed., 316; 1 WASHBURN, REAL PROPERTY, 278.

[9] Overton *v.* Lacy, 6 T. B. Mon. (Ky.) 13; Dowset *v.* Sweet, 1 Amb. 175; Humphrey *v.* Tayleur, 1 Amb. 136; McCord *v.* Bright, 44 Ind. App. 275; Cameron *v.* Steves, 4 Allen (N. Brunswick) 141. See Martin *v* Wagener, 1 T. & C. (N. Y.) 509, 522; FREEMAN, COTENANCY, § 28; CRITICA JURIS INGENIOSA, 133; FLETA, lib. 3, cap. 4, § 6, p. 180, ed. 1685; PERK, PROF. BK., p. 203; 1 PREST. SHEP. TOUCH. 71.

[10] *Cf.* Dressler *v.* Mulhern, 136 N. Y. Supp. 1049.

[11] BL. BK. II, 182. The Transfer Tax Law seems never to have been applied to such a case as this. *Cf.* cases collected in n. 5 CONS. L., p. 5982; Matter of Patterson,

old conception of property rights may seem, courts have wisely held that they shall not be changed by implications not strictly necessary. Of course the imposition of a tax does not directly involve unsettling titles, but an unsystematic breaking away from the theories of seizin and the nature of estates must eventually have that result.

IS THE LIABILITY OF THE MAKER OF A DOMICILED NOTE PRIMARY OR SECONDARY? — The effect of the failure of a bank upon the relation of the parties to a promissory note made payable at the bank has been determined by the Court of Appeals of New York in the recent case of *Baldwin's Bank of Penn Yan* v. *Smith*, 109 N. E. 138.[1] The holder of a note sent it by post for collection to the bank at which it was made payable, and did not make inquiries, nor hear from the bank, for seven days, at which time the bank failed. The maker had sufficient funds with the bank and had given it orders to pay the note when he learned that it was there. The bank promised to do so, but did nothing in furtherance of the order. It was held that the holder could not recover from the maker. The decision was rested upon the ground of payment, or, in the alternative, negligence of the bank as the holder's agent in not procuring payment.

In so far as this result is based upon actual payment, it cannot be supported. Undoubtedly the courts have gone to great lengths to spell out a payment where negotiable paper has been sent to a bank which has funds on hand to pay it. Thus the transfer of credits upon the books of the bank has been held sufficient.[2] And there is a case in Massachusetts to the effect that the cancellation of the note, the preparation of a cashier's check to be remitted to the holder, and the making of a memorandum on a pad, to be entered upon the permanent books at the end of the day, constituted a payment.[3] The validity of this decision may very well be doubted, for although the maker had been deprived of control over his account to the extent of the amount of the note, there had been no step toward giving anything to the holder. And where, as in the principal case, there has not even been an act depriving the maker of control over his deposit, it is impossible to find any payment.[4]

Regarding the second contention of the court, it is futile to talk of negligence of the holder in sending the note by mail, or of the negli-

---

81 N. Y. Misc. 86, 142 N. Y. Supp. 1064; *In re* Thompson's Estate, 130 N. Y. Supp. 970. It has been held that when a joint tenant takes by survivorship no tax lies. *In re* Heiser's Estate, 85 N. Y. Misc. 271, 147 N. Y. Supp. 557. Tenancy by the entirety is then an *a fortiori* case, for joint tenants are seized *per my et per tout*. BL. BK. II, 182. Minor states that this maxim should be *per tout et per mie*. 2 MINOR, INST., 4 ed., 470. *Cf.* "*Quilibet totum totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatim per se.*" LEWIS' BL. BK. II, 182 n. (*j*).

[1] See RECENT CASES, p. 217.

[2] Pratt *v.* Foote, 9 N. Y. 463; Daniel *v.* St. Louis National Bank, 67 Ark. 223, 54 S. W. 214.

[3] Nineteenth Ward Bank *v.* First National Bank, 184 Mass. 49, 67 N. E. 670.

[4] Sutherland *v.* First National Bank, 31 Mich. 230. *Cf.* Moore *v.* Norman, 52 Minn. 83, 53 N. W. 809.